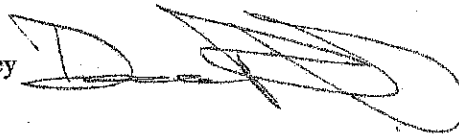


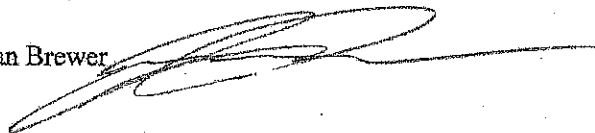
Bill of Sale 45 PT

This is bill of sale for a PT 145 ACP serial # NCO12119 on 5/25/2010 between David Richey as the seller and Jordan Brewer as the buyer for \$350.00.

Seller: David Richey



Buyer: Jordan Brewer



Witness: Mike Groberg



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

FILED
U.S. DISTRICT COURT

2011 OCT 18 P 3:53

DISTRICT OF UTAH

BY: DEPUTY CLERK

UNITED STATES OF AMERICA

Plaintiff,

Order for Mental Health Assessment

Jordan Alan Neves Brewer

Defendant

Docket No. 1:11-CR-00115-001-CW

For the purpose of assisting the Court, further information is necessary to obtain an assessment of the defendant's current mental status for consideration for pretrial release and/or treatment while on pretrial release.

IT IS ORDERED that the defendant submit to a mental health assessment, psychiatric examination, and/or psychological evaluation before a qualified practitioner, in order to provide further information to the Court.

IT IS FURTHER ORDERED that the United States Pretrial Services Agency, pursuant to 18 USC § 3154(4), (7), and (12), pay all reasonable and necessary expenses from funds allocated for such purposes.

DATED this 18 day of October 2011.

BY THE COURT:



David O. Nuffer
Chief United States Magistrate Judge

IN THE UNITED STATES COURT FOR THE DISTRICT OF UTAH
NORTHERN DIVISION

CHRIS HOGAN,
Plaintiff,

vs.

UTAH TELECOMMUNICATION OPEN
INFRASTRUCTURE AGENCY, AKA
UTOPIA,

AND

TODD MARRIOTT, EXECUTIVE
DIRECTOR OF UTAH
TELECOMMUNICATION OPEN
INFRASTRUCTURE AGENCY

AND

DOES 1-5

Defendants.

MEMORANDUM DECISION AND
ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION TO DISMISS AND
DENYING PLAINTIFF'S MOTION
TO STRIKE

Case No. 1:11-CV-64 TS

This matter is before the Court on Defendants Utah Telecommunication Open
Infrastructure Agency ("UTOPIA") and Todd Marriott's (collectively "Defendants") Motion to

Dismiss¹ and Plaintiff Chris Hogan’s Motion to Strike.² For the reasons discussed more fully below, the Court will grant in part and deny in part Defendants’ Motion to Dismiss and will deny Plaintiff’s Motion to Strike.

I. BACKGROUND

The following facts are taken from Plaintiff’s Amended Complaint. Plaintiff’s Complaint centers around actions allegedly taken by UTOPIA, an inter-local cooperative entity and political subdivision of the State of Utah, and Mr. Marriott—a Utah resident—who serves as UTOPIA’s executive director. Plaintiff is a citizen of the State of Colorado.

Plaintiff alleges that, on or about May 9, 2009, he entered into an agreement with UTOPIA (the “Agreement”) to provide his services as an independent contractor. According to Plaintiff, he had already been working for UTOPIA for almost a year when he entered into the Agreement. Under the terms of the Agreement, Plaintiff was to provide certain services including “sales, marketing, business development, operations, IT, and engineering efforts regarding the UTOPIA network.”³ In exchange, Plaintiff was to receive \$11,500 per month. By its terms, the Agreement was to expire in May of 2011. Plaintiff asserts that despite the termination clause in the Agreement, Mr. Marriott and UTOPIA’s general counsel, David Shaw, led Plaintiff to believe that the Agreement would be renewed.

¹Docket No. 19.

²Docket No. 27.

³Docket No. 24, Ex. A, at 1-2.

Though not included in the terms of the Agreement, UTOPIA also provided Plaintiff an apartment to live in during the week, for which it paid both the utilities and internet. UTOPIA also provided Plaintiff with an office, computer, and cell phone, none of which were provided for under the Agreement.

Plaintiff alleges that his duties with UTOPIA included:

developing sales, marketing, developments functions for UTOPIA in the business and consumer markets, branding, marketing strategy and plan, hiring, hiring of employees, developing marketing, hiring partner agencies, conducting requests for proposal processes to secure partners, liaising with all of UTOPIA's partners and stakeholders, meeting with city officials to attract new member cities to UTOPIA, making presentation about UTOPIA, meeting with strategic partners both inside and outside of UTOPIA, attracting and developing new service providers and application providers to the UTOPIA network, helping to develop the business model for the organization, and actively participating in board and executive committee meetings.⁴

Plaintiff alleges that Utopia dictated the pace and sequence of how he performed his job and also set the hours he worked. According to Plaintiff, as the head of multiple departments, he was able to delegate his functions. In early 2011, Plaintiff was made the Director of Operations for UTOPIA. This meant that Plaintiff also became responsible for such processes as customer care, service provider support, trouble ticketing, installation and customer fulfillment, billing, and other similar processes. Plaintiff acknowledges that throughout the term of his contract he was a 1099 contractor and maintained separate business and tax records.

Plaintiff alleges that the negative employment actions taken against him were in retaliation for statements Plaintiff made to Mr. Jared Pantier, an outside plant manager and

⁴*Id.* at 4-5.

UTOPIA employee, who also reports directly to Mr. Marriott. Plaintiff had suspicions that UTOPIA, through Mr. Marriott, may be engaging in anti-competitive bidding practices. Plaintiff asserts that his suspicions were based on the involvement of Tetra Tech, a company for which Mr. Marriott's brother serves on the upper management for the region of Utah. According to Plaintiff, Tetra Tech is a company with a disfavored status with UTOPIA. Plaintiff became suspicious when Tetra Tech submitted bid amounts that were extremely close to the projected cost amounts developed by UTOPIA. UTOPIA later terminated the bidding process in which Tetra Tech had directly been involved. However, Plaintiff alleges that it was his understanding that Tetra Tech had discussed working under another general contractor, Corning Incorporated.

Plaintiff asserts that he spoke with Mr. Pantier about his suspicions, instead of filing a report with the authorities, because he acknowledged that he could be wrong and decided to be cautious before accusing Mr. Marriott and Tetra Tech of engaging in anti-competitive bidding practices. Plaintiff alleges:

In order to make sure the bidding process did not jeopardize the success of UTOPIA and in hopes of making the process transparent, [Plaintiff] suggested to [Mr.] Pantier that he ensure that the Executive Board knew about the relationship between Tetra Tech and [Mr.] Marriott as well as the possibility that Corning, Incorporated, may be having discussions with Tetra Tech about awarding the curb to home subcontract to Tetra Tech.⁵

Plaintiff alleges that soon thereafter, Mr. Marriott requested that Plaintiff sign a termination agreement. Plaintiff asserts that he would not sign the termination agreement and, as a result, Mr. Marriott began sending texts to Plaintiff's wife's cell phone warning Plaintiff to

⁵Docket No. 24, at 10.

keep quiet about UTOPIA's dealings. Plaintiff further alleges that Defendants attempted to have him evicted from the apartment he lived in during the week and locked him out of the UTOPIA office he used. Plaintiff also believes that, after he refused to sign the termination agreement, a member of UTOPIA's executive staff told UTOPIA employees that Plaintiff had been committing crimes.

Plaintiff also makes various allegations about being removed from a separate company in which he was involved with Mr. Marriott and Mr. Shaw, a non-profit corporation entitled "GigNation."

Plaintiff subsequently sought legal advice and directed counsel to serve a draft complaint on the executive—Plaintiff alleges managing—board of UTOPIA. Plaintiff asserts that the draft complaint was accompanied by a letter notifying UTOPIA that Plaintiff intended to file a lawsuit but was open to negotiating a mutually acceptable resolution instead of litigation. Plaintiff alleges that, in response, he received a letter from Mr. Marriott, indicating that "your actions specific to recent interactions with Mr. Jarrod (sic) Pantier are clearly outside the scope of that certain Professional Services Agreement, together with applicable Statements of Work, dated as of May 12, 2009."⁶ Plaintiff subsequently sent a demand letter to UTOPIA's executive board on March 24, 2011. Mr. Shaw responded to Plaintiff's demand letter on April 4, 2011, and, according to Plaintiff, denied all of Plaintiff's claims.

Plaintiff has attached as an exhibit to his Amended Complaint a redacted version of this response to his demand letter and alleges that he has redacted the letter because the Utah Third

⁶Docket No. 24, Ex. C, at 1.

District Court found the paragraphs to be redundant, immaterial, impertinent, or scandalous. Defendants attached the same letter to their Answer to Plaintiff's Amended Complaint and Motion to Dismiss, without redactions.

II. STANDARD OF REVIEW

In considering a motion to dismiss under Rule 12(b)(6), all well-pleaded factual allegations, as distinguished from conclusory allegations, are accepted as true and viewed in the light most favorable to Plaintiff as the nonmoving party.⁷ Plaintiff must provide "enough facts to state a claim to relief that is plausible on its face."⁸ All well-pleaded factual allegations in the complaint are accepted as true and viewed in the light most favorable to the nonmoving party.⁹ But, the court "need not accept . . . conclusory allegations without supporting factual averments."¹⁰ "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted."¹¹ The Supreme Court has

⁷ *Ruiz v. McDonnell*, 299 F.3d 1173, 1181 (10th Cir. 2002).

⁸ *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 547 (2007).

⁹ *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997).

¹⁰ *S. Disposal, Inc., v. Tex. Waste*, 161 F.3d 1259, 1262 (10th Cir. 1998); *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991).

¹¹ *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991).

explained that a plaintiff must “nudge[][his] claims across the line from conceivable to plausible” to survive a motion to dismiss.¹²

Thus, the mere metaphysical possibility that *some* plaintiff could prove *some* set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims.¹³

The Supreme Court recently provided greater explanation of the standard set out in *Twombly* in *Ashcroft v. Iqbal*.¹⁴ In *Iqbal*, the Court reiterated that while FED.R.CIV.P. 8 does not require detailed factual allegations, it nonetheless requires “more than unadorned, the-defendant-unlawfully-harmed-me accusation[s].”¹⁵ “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’”¹⁶ “Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’”¹⁷

The Court in *Iqbal* stated:

Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed

¹² *Twombly*, 550 U.S. at 547.

¹³ *The Ridge at Red Hawk, LLC v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007) (emphasis in original).

¹⁴ 556 U.S. 662 (2009).

¹⁵ *Id.* at 1949.

¹⁶ *Id.* (quoting *Twombly*, 550 U.S. at 555).

¹⁷ *Id.* (quoting *Twombly*, 550 U.S. at 557).

with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not show[n]—that the pleader is entitled to relief.

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.¹⁸

In considering the adequacy of a plaintiff’s allegations in a complaint subject to a motion to dismiss, a district court not only considers the complaint, but also “documents incorporated into the complaint by reference, and matters of which a court may take judicial notice.”¹⁹ Thus, “notwithstanding the usual rule that a court should consider no evidence beyond the pleadings on a Rule 12(b)(6) motion to dismiss, ‘[a] district court may consider documents referred to in the complaint if the documents are central to the plaintiff’s claim and the parties do not dispute the documents’ authenticity.”²⁰

¹⁸*Id.* at 1949-50 (internal quotation marks and citations omitted).

¹⁹*Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) (citing 5B WRIGHT & MILLER § 1357 (3d ed. 2004 & Supp. 2007)).

²⁰*Alvarado v. KOBTV, LLC*, 493 F.3d 1210, 1215 (10th Cir. 2007) (quoting *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002)).

III. DISCUSSION

Defendant moves this Court to dismiss Plaintiff's first, second, fourth, fifth and sixth causes of action of Plaintiff's Amended Complaint for failure to state a claim for which relief may be granted. Plaintiff contends that, accepting the allegations in his Amended Complaint as true, viewing them in the light most favorable to Plaintiff, and drawing all reasonable inferences in his favor, Plaintiff has stated a claim upon which relief may be granted as to each of the claims listed above. Plaintiff also moves the Court to strike four paragraphs from pleadings submitted by Defendants. The Court will address each of the claims individually.

A. FIRST AMENDMENT

Defendant alleges that Plaintiff's first cause of action—for violation of his right of speech under the First and Fourteenth Amendment of the United States Constitution, brought pursuant to 42 U.S.C. § 1983—fails because the speech for which Plaintiff allegedly suffered retaliation was made in his official duties and did not pertain to a matter of public concern. Defendants also assert that their interests in providing efficient public service outweighs Plaintiff's interest in the speech in question.

“[T]he First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.”²¹ There is some dispute in this action whether, in application, Plaintiff was an independent contractor or employee. However, for purposes of the First Amendment analysis, the Supreme Court has previously found no

²¹*Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006).

“difference of constitutional magnitude between independent contractors and employees.”²² The Supreme Court further held that, for First Amendment speech purposes, “[i]ndependent government contractors are similar in most relevant respects to government employees” and “the same form of balancing analysis should apply to each.”²³

The balancing analysis the Court must weigh to determine whether Plaintiff was denied his constitutional rights is referred to as the Pickering test, or the Garcetti/Pickering analysis.²⁴

The test comprises five elements, called ‘prongs’: (1) whether the speech was made pursuant to an employee's official duties; (2) whether the speech was on a matter of public concern; (3) whether the government's interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests; (4) whether the protected speech was a motivating factor in the adverse employment action; and (5) whether the defendant would have reached the same employment decision in the absence of the protected conduct.²⁵

“The first three steps of the Garcetti/Pickering analysis are issues of law ‘to be resolved by the district court, while the last two are ordinarily for the trier of fact.’”²⁶ Under the Garcetti/Pickering analysis the Court must first analyze whether the speech occurred pursuant to

²²*Bd. of Cnty. Comm’rs, Wabaunsee Cnty., Kan., v. Umbehr*, 518 U.S. 668, 684 (1996).

²³*Id.* at 684-85.

²⁴*See Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1202 (10th Cir. 2007).

²⁵*Dixon v. Kirkpatrick*, 553 F.3d 1294, 1302 (10th Cir. 2009) (citing *Brammer-Hoelter*, 492 F.3d at 1202-03).

²⁶*Rohrbough v. Univ. of Colo. Hosp. Auth.*, 596 F.3d 741, 745 (10th Cir. 2010) (quoting *Brammer-Hoelter*, 492 F.3d at 1203).

the public employee Plaintiff's official duties and the inquiry ends after that initial step if the court answers this legal question in the affirmative.²⁷

In determining whether speech is made pursuant to an employee's official duties "the Tenth Circuit has taken a case-by-case approach, looking both to the content of the speech, as well as the employee's chosen audience."²⁸

[T]he court has focused on whether the speech activity stemmed from and was of the type that the employee was paid to do and has highlighted that the ultimate question in determining whether speech falls within an employee's official duties is whether the employee speaks as a citizen or instead as a governmental employee.²⁹

"Consequently, if an employee engages in speech during the course of performing an official duty and the speech reasonably contributes to or facilitates the employee's performance of the official duty, the speech is made pursuant to the employee's official duties."³⁰

In the instant action, Plaintiff voiced his suspicions to a fellow employee that UTOPIA, through Mr. Marriott, may be engaging in anti-competitive bidding practices with a company—Tetra Tech—in which Mr. Marriott's brother is involved in an upper management position. The parties dispute whether the content of Plaintiff's statements were within the scope of his official duties.

²⁷*See Hesse v. Town of Jackson, Wyo.*, 541 F.3d 1240, 1249 (10th Cir. 2008).

²⁸*Rohrbough*, 596 F.3d at 746.

²⁹*Id.* (internal quotations and citations omitted).

³⁰*Brammer-Hoelter*, 492 F.3d at 1203.

Plaintiff asserts that a letter sent to Plaintiff from Mr. Marriott after the statements in question were made is dispositive on this issue. In the letter, Mr. Marriott indicates to Plaintiff that his “actions specific to recent interactions with Mr. Jarrod [sic] Pantier are clearly outside the scope of that certain Professional Services Agreement, together with applicable Statements of Work, dated as of May 12, 2009.”³¹ Plaintiff argues that this comment by Mr. Marriott establishes that his statements to Mr. Pantier were outside of the scope of his official duties as such statements were not made pursuant his Agreement.³²

The Tenth Circuit has indicated that its “precedents since *Garcetti* have taken a broad view of the meaning of speech that is pursuant to an employee’s official duties.”³³ Moreover, “speech may be made pursuant to an employee's official duties even if it deals with activities that the employee is not expressly required to perform.”³⁴ Therefore, Mr. Marriott’s assertion that Plaintiff’s actions with regard to Mr. Pantier were clearly outside the scope of the Agreement, is not dispositive of whether Plaintiff was acting pursuant to his official duties in making his statements to Mr. Pantier.³⁵ Rather, if the speech “reasonably contributes to or facilitates the

³¹Docket No. 24, Ex. C, at 1.

³²In oral argument, Defendants argued that the letter from Mr. Marriott was not focused on the statements made by Plaintiff, rather, it was focused on the insubordinate action of Plaintiff in taking his allegations to a fellow employee. On this argument alone, the Court is persuaded that the letter from Mr. Marriott is not dispositive on this issue.

³³*Thomas v. City of Blanchard*, 548 F.3d 1317, 1324 (10th Cir. 2008) (internal quotations omitted).

³⁴*Brammer-Hoelter*, 492 F.3d at 1192, 1203.

³⁵*See Thomas*, 548 F.3d 1323-24 (“In this case, Mr. Thomas’s supervisor, Monte Ketchum, conceded that Mr. Thomas’s official duties did not include a duty to contact the OSBI

employee's performance of the official duty, the speech is made pursuant to the employee's official duties.³⁶

Plaintiff indicates in his Amended Complaint that he made the statement's in question "[i]n order to make sure the bidding process did not jeopardize the success of UTOPIA and in hopes of making the process transparent, [Plaintiff] suggested to Pantier that he ensure that the Executive Board knew about the relationship between Tetra Tech and Mr. Marriott."³⁷ Moreover, Plaintiff explains that his motive in making this suggestion to Mr. Pantier was "to protect the public trust of the citizens of UTOPIA's member cities and of taxpayers whose tax dollars helped to fund UTOPIA, and to prevent UTOPIA from entering into a contract that could be illegal and would endanger UTOPIA's continual success and existence."³⁸

The Court finds that the facts of this case are similar to those confronted by the Tenth Circuit in *Casey v. West Las Vegas Independent School District*.³⁹ In that case, the court analyzed the statements of the former superintendent of a school district. The court found that statements made to the board (the superintendent's supervisors) were precluded under *Garcetti* because the superintendent was under an obligation to provide candid advice and counsel to her

for perceived criminal violations. But that is not the end of the matter. The inquiry is a practical one . . . Therefore the fact that it was not expressly Mr. Thomas's duty to report to the OSBI is not dispositive on whether he was acting pursuant to his duties.") (internal quotations omitted).

³⁶*Brammer-Hoelter*, 492 F.3d at 1203.

³⁷Docket No. 24, at 10.

³⁸*Id.*

³⁹473 F.3d 1323 (10th Cir. 2007).

supervisors.⁴⁰ The court went on to hold that statements by the superintendent to the New Mexico Attorney General “however, are another kettle of fish” because the plaintiff “was not seeking to fulfill her responsibility of advising the Board when she went to the Attorney General’s office.”⁴¹

Admittedly, this case is distinguishable from *Casey* because Plaintiff’s statements were not made directly to the executive board. Instead, Plaintiff made his statements to an intermediary, Mr. Pantier, and suggested that he speak to the board with regard to his concerns. Thus, Plaintiff acknowledges that the intended recipient of Plaintiff’s statements was the executive board. In his Amended Complaint Plaintiff asserts that his duties with UTOPIA included actively participating in board and executive committee meetings. Given the extensive list of duties Plaintiff provides in his Amended Complaint,⁴² it is difficult for the Court to foresee a situation where Plaintiff would not be under an obligation to report a concern regarding UTOPIA to the board. Particularly a concern which Plaintiff felt could “endanger UTOPIA’s continual success and existence.”⁴³ Plaintiff has alleged that he had a duty to actively participate in board and executive committee meetings and the statements he made to Mr. Pantier were meant to influence the board. For these reasons, the Court finds that Plaintiff’s statements to Mr. Pantier were within the scope of his official duties.

⁴⁰*Id.* at 1332.

⁴¹*Id.*

⁴²*See* Docket No. 24, at 4.

⁴³*Id.* at 10.

Because the Court finds that Plaintiff's statements to Mr. Pantier were within the scope of his official duties, it will dismiss Plaintiff's first cause of action for violation of his free speech rights under the First and Fourteenth Amendment of the United States Constitution.

B. UTAH CODE ANNOTATED § 67-21-3

Plaintiff's second cause of action is for violation of Utah Code Annotated § 67-21-3 ("§ 67-21-3"). Plaintiff alleges Defendants took an adverse action against him because he communicated in good faith the violation or suspected violation of a law, rule, or regulation adopted under the laws of Utah. Defendants contend that the Court should dismiss this claim on a number of grounds. First, Defendants argue that the Court should dismiss the claim because Plaintiff failed to strictly comply with the procedural requirements of the Utah Governmental Immunity Act ("UGIA"). Next, Defendants argue that even if Plaintiff had complied with the requirements of the UGIA, the Court should dismiss this claim because § 67-21-3 only applies to government employees, not to independent contractors.

Without reaching Defendants' other arguments, this Court will dismiss Plaintiff's claim because it is unable to conclude that § 67-21-3 applies to independent contractors.

Utah Code Annotated § 67-21-2(3) provides that "employees" are covered under this Chapter of the Utah Code. It provides that "[e]mployee" means a person who performs a service for wages or other remuneration under a contract of hire, written or oral, express or implied." Plaintiff asserts that "[i]ndependent contractors fall squarely within this definition," however, he does not cite any case law to support this assertion.⁴⁴

⁴⁴Docket No. 29, at 14.

Plaintiff argues that this Court should find “[Plaintiff], an independent contractor, is also an employee under section 67-21-3 because he performed services for UTOPIA for wages or other remuneration under a written contract for hire.”⁴⁵ It is undisputed that Plaintiff was hired under a contract to perform services. However, such contracts are not included within the definition of “employee” for purposes of Utah Code, Title 67, Chapter 21. In effect, Plaintiff requests that this Court find that a contract for hire, which creates an at-will employment relationship, is synonymous to a contract for services, which results in a contractual relationship.

Employees and independent contractors are not synonymous and are not afforded the same rights of recovery under the law. For this reason, various courts that have found that statutory protections that apply to employees do not apply to independent contractors.⁴⁶ Moreover, the Court notes that other Utah statutes that have used substantially the same language to define employee—specifically the language “contract of hire”—have not included independent contractors under that definition.⁴⁷

⁴⁵*Id.*

⁴⁶*See IOSTAR Corporation v. Stuart*, 2009 WL 270037, at *18 (D. Utah Feb. 3, 2009) (holding that the wrongful discharge doctrine grew out of a need to protect at-will employees and does not protect independent contractors); *Vesom v. Atchison Hosp. Ass’n*, 2006 WL 2714265, at *25 (D. Kan. Sep. 22, 2006) *aff’d*, 279 Fed. Appx. 624 (10th Cir. 2008) *cert. denied*, 129 S. Ct. 459 (2008) (finding independent contractor not protected by Kansas whistle blower statute, because the tort is only an exception to the employment-at will doctrine and is based on the wrongful conduct of an entity with the power to terminate the employee).

⁴⁷*See* Utah Code Annotated § 34A-2-104(1)(b)(i) & (5). *Compare* section (1) specifying that an employee is a person in the service of any employer under any contract of hire, express or implied *with* section (5) explaining that an employee does not include various positions including independent contractors.

The Court agrees that “[t]he purpose of statutory construction is to ‘give effect to the Legislature’s intent.’”⁴⁸ Given the dearth of support for Plaintiff’s asserted position, the Court is unwilling to find that the Legislature intended its definition of “employees” for purposes of this act to include independent contractors. For this reason, the Court will dismiss Plaintiff’s claim under § 67-21-3.

C. GOOD FAITH AND FAIR DEALING

Plaintiff’s fourth cause of action is for violation of the covenant of good faith and fair dealing. Plaintiff alleges in this claim that Defendants violated the covenant of good faith and fair dealing when they (1) unilaterally terminated the Agreement; (2) immediately thereafter hired one of Mr. Marriott’s neighbors, Gary Jones, to replace Plaintiff in the role of Marketing Director; (3) locked Plaintiff out of his office computer and company cell phone; (4) announced his termination to all UTOPIA employees; and (5) attempted to lock Plaintiff out of the apartment rented for Plaintiff by Defendants. Defendants argue that this claim fails because, through these allegations, Plaintiff is attempting to create rights that the Agreement does not provide. Moreover, Defendants argue that none of these allegations support a finding of the breach of covenant of good faith and fair dealing because they occurred after the alleged termination of the Agreement.

⁴⁸Docket No. 29, at 13 (quoting *Progressive Cas. Ins. Co., v. Ewart*, 167 P.3d 1011, 1014 (Utah 2007)).

Parties to a contract must exercise their contractual rights in good faith.⁴⁹ Good faith and fair dealing means the parties must be faithful to the “‘agreed common purpose’” and consistent with “‘the justified expectations of the other party.’”⁵⁰ The covenant cannot, however, “be read to establish new, independent rights or duties to which the parties did not agree ex ante.”⁵¹

In the instant case, Plaintiff alleges numerous violations of the covenant of good faith and fair dealing. The Court notes that Plaintiff may be unable to prove that each of these allegations constitutes a violation of the covenant of good faith and fair dealing. However, to the extent the Defendants took actions that would prevent Plaintiff from performing his obligations under the Agreement, such is sufficient to maintain an action for breach of the covenant of good faith and fair dealing.

Because Plaintiff had a justified expectation that he would be allowed to perform his obligations under the Agreement, the Court will deny Defendants’ Motion to Dismiss Plaintiff’s fourth cause of action for violation of the covenant of good faith and fair dealing.

D. WRONGFUL DISCHARGE

Plaintiff’s fifth cause of action is for wrongful discharge in violation of public policy. Plaintiff alleges that Defendants’ actions violated Utah’s strong public policy preventing government employers from retaliating against their employees for communicating their concerns

⁴⁹*See Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 55 (Utah 1991).

⁵⁰*Olympus Hills Shopping Ctr., Ltd. v. Smith’s Food & Drug Ctrs., Inc.*, 889 P.2d 445, 451 (Utah Ct. App. 1994) (quoting Restatement (Second) of Contracts § 205 cmt. a (1979)).

⁵¹*Oakwood Village LLC v. Albertsons, Inc.*, 104 P.3d 1226, 1240 (Utah 2004) (internal citations omitted).

that the employer may be engaging in, or is about to engage in, illegal activities. Plaintiff also alleges that he acquired a significant legal right when he contracted with UTOPIA to provide his professional services as an independent contractor and that Defendants violated the public policy requiring the parties to a contract to perform the terms of contract in good faith and with fair dealing. Defendants argue that this claim should be dismissed because a claim under the tort of wrongful discharge does not apply to independent contractors and because, even if such a claim did apply to independent contractors, Plaintiff's allegations still fail to state a claim for which relief can be granted.

In his opposition, Plaintiff alleges for the first time that he is an employee of UTOPIA. Plaintiff cites to various Utah cases that provide factors to be weighed in considering whether a person is an employee or independent contractor.⁵² The Court is not persuaded that it should find Plaintiff to be an employee for purposes of this claim.

First, the Court notes that Plaintiff attempts to obtain the benefits of the Agreement as an independent contractor, while also availing himself of Utah statutory and common-law protections meant for non-contracted, at-will employees. Plaintiff's employment relationship with Defendants was not at-will. In *Touchard v. La-Z-Boy, Inc.*,⁵³ the Utah Supreme Court held that "[w]hen employment is at-will, either the employer or the employee may terminate the employment for any reason (or no reason) except where prohibited by law. Accordingly, an

⁵²See *Utah Home Fire Ins. Co., v. Manning*, 985 P.2d 243 (Utah 1999); *Petro-Hunt, LLC v. Dep't of Workforce Servs.*, 197 P.3d 107 (Utah Ct. App. 2008).

⁵³148 P.3d 945 (Utah 2006).

employer's decision to terminate an employee is presumed to be valid.”⁵⁴ In contrast, the method for termination of Plaintiff’s employment with Defendants was provided for in the Agreement. Pursuant to the terms of the Agreement, Plaintiff cannot be discharged at-will by UTOPIA—or any of the Defendants—and any termination before the termination date set out in the Agreement is presumptively invalid.

Moreover, the facts of this case do not lend themselves to the purposes for which the Utah Supreme Court has indicated the tort of wrongful termination in violation of public policy exception exists. In *Peterson v. Browning*,⁵⁵ the Utah Supreme Court held that an action for wrongful termination in violation of public policy “is imposed by law, and thus is properly conceptualized as a tort.”⁵⁶ In *Peterson*, the Court further explained:

[i]n the case of the public policy exception, potential punitive damages will exert a valuable deterrent effect on employers who might otherwise subject their employees to a choice between violating the law or losing their jobs. The employment-at-will doctrine does not grant an employer the privilege of subjecting its employees to the risks of criminal liability.⁵⁷

Here, no such public policy exception is necessary nor, based on this Court’s review of relevant Utah case law, is it merited. This reasoning is also in line with this Court’s holding in *IOSTAR Corporation v. Stuart*.⁵⁸ In that case, this Court held “[t]he wrongful discharge doctrine

⁵⁴*Id.* at 948.

⁵⁵832 P.2d 1280 (Utah 1992).

⁵⁶*Id.* at 1285.

⁵⁷*Id.*

⁵⁸2009 WL 270037.

grew out of a need to protect at-will employees, who are under the total control of the employer and without separate or independent contractual rights that provide employment protections. As such, it does not protect independent contractors.”⁵⁹ Plaintiff’s rights are provided for under the Agreement. Thus, the Court will proceed on the basis that Plaintiff is an independent contractor and determine his rights per the Agreement.

For the foregoing reasons, the Court will dismiss Plaintiff’s fifth cause of action for wrongful discharge in violation of public policy.

E. PROMISSORY ESTOPPEL

Plaintiff’s sixth cause of action alleges that, based on Plaintiff’s discussions with Mr. Shaw and Mr. Marriott, Plaintiff had an expectation of employment with UTOPIA through May 15, 2012. To support this claim, Plaintiff alleges that he forwent several job offers for the next year based on his reliance on Defendants’ representations. Defendants argue that this claim should be dismissed because UTOPIA never made a promise to renew the Agreement.

In Utah, the elements of promissory estoppel are: ‘(1) The [promisee] acted with prudence and in reasonable reliance on a promise made by the [promisor]; (2) the [promisor] knew that the [promisee] had relied on the promise which the [promisor] should reasonably expect to induce action or forbearance on the part of the [promisee] or a third person; (3) the [promisor] was aware of all material facts; and (4) the [promisee] relied on the promise and the reliance resulted in a loss to the [promisee].’

⁵⁹*Id.* at *18.

In addition, a promisee must support a promissory estoppel claim with more than a subjective understanding of the promisor's statements. The claim must show evidence of a reasonably certain and definite promise.⁶⁰

Detrimental to Plaintiff's claim for promissory estoppel is the requirement of a reasonably certain and definite promise. In his Amended Complaint, Plaintiff has failed to point to a single statement made by any of the Defendants that the Agreement would be renewed for a subsequent year. Plaintiff has alleged that this was his subjective understanding based upon an alleged conversation with Mr. Shaw and Mr. Marriott. However, such is insufficient to maintain a claim for promissory estoppel. Plaintiff's subjective understanding based on an alleged conversation is not enough—without more specific facts as to an actual promise made by the Defendants—to estop the Defendants from allowing the Agreement to expire on May 15, 2011. For this reason, the Court will dismiss Plaintiff's claim for promissory estoppel.

F. MOTION TO STRIKE

Plaintiff asserts that two paragraphs in a letter attached to Defendants' Motion to Dismiss as Exhibit A and also attached to Defendants' Answer to Amended Complaint as Exhibit A are redundant, immaterial, impertinent, or scandalous. For this reason, Plaintiff requests that this Court either: strike the offending letter attached to Defendants' Motion, or, strike the allegedly offensive paragraphs as redacted in Plaintiff's exhibit. Defendants contend that the Court should deny Plaintiff's Motion to Strike because (1) the letter constitutes Defendants' statutorily-

⁶⁰*J.R. Simplot Co. v. Sales King Intern., Inc.*, 17 P.3d 1100, 1107 (Utah 2000) (quoting *Nunley v. Westates Casing Servs., Inc.*, 989 P.2d 1077, 1088 (Utah 1999)).

required response under the UGIA and (2) the Court should deny the Motion as moot because Plaintiff expressly alleges the accusations in his original Complaint.

Federal Rule of Procedure 12(f) provides that “the court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.”

The letter in question is not irrelevant or immaterial to the case, as is demonstrated by the fact that both parties attached a version of the letter to their pleadings before this Court. Indeed, Plaintiff relies upon this letter to demonstrate compliance with the UGIA. Nor is the letter redundant merely because Defendants attached an unedited version of the letter to their pleadings.

Plaintiff also argues that the paragraphs in question constitute scandalous matter. Black’s Law Dictionary defines scandalous matter as “matter that is both grossly disgraceful (or defamatory) and irrelevant to the action or defense.”⁶¹ Courts that have applied Rule 12(f) and stricken scandalous matter have done so only where the material was of an extreme nature.⁶² The contents of this letter are not so extreme so as to render it scandalous matter.

Because the paragraphs in question do not meet the requirements of Rule 12(f), the Court will deny Plaintiff’s Motion to Strike.

⁶¹BLACK’S LAW DICTIONARY 1345 (7th ed. 1999).

⁶²*See Garrett v. Selby Connor Maddux & Janer*, 425 F.3d 836 (10th Cir. 2005) (dismissing an appeal where it contained abusive and offensive language).

IV. CONCLUSION

For the foregoing reasons, the Court will grant Defendants' Motion to Dismiss as to Plaintiff's First, Second, Fifth, and Sixth claims and deny Defendants' Motion to Dismiss as to Plaintiff's Fourth claim. Moreover, the Court will deny Plaintiff's Motion to Strike. It is therefore

ORDERED that Defendants' Motion to Dismiss (Docket No. 19) is GRANTED IN PART and DENIED IN PART. It is further

ORDERED that Plaintiff's Motion to Strike (Docket No. 27) is DENIED. Moreover, the parties are

ORDERED to submit the remaining claims of breach of contract and violation of the covenant of good faith and fair dealing to a settlement conference.

DATED October 18, 2011.

BY THE COURT:



TED STEWART
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

ROBERT E. TALLADA, JR.,	:	
Plaintiff,	:	ORDER OF RECUSAL
vs.	:	
USU CHARTER FEDERAL CREDIT UNION,	:	Case No. 1:11-cv-105
Defendant.	:	

I recuse myself in this case, and ask that the appropriate assignment card
equalization be drawn by the clerk's office.

DATED this 18th day of October, 2011.

BY THE COURT:



Clark Waddoups
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

ALBION INTERNATIONAL, INC.,

Plaintiff,

v.

AMERICAN INTERNATIONAL
CHEMICAL, INC., a Massachusetts
corporation, AMT LABS, INC., a Utah
corporation, and GLOBAL CALCIUM
PRIVATE LIMITED, an Indian private limited
company,

Defendants.

ORDER GRANTING PRO HAC VICE
ADMISSION

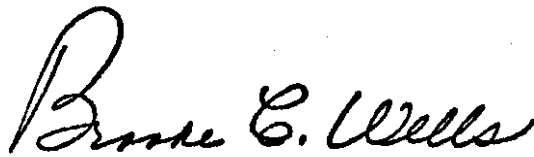
Case No. 2:07-CV-994 CW

District Judge Clark Waddoups

Magistrate Judge Brooke Wells

It appearing to the Court that Petitioner meets the pro hac vice admission requirements of
DUCiv R 83-1.1(d), the motion for the admission pro hac vice of Michael C. Lynch in the United
States District Court, District of Utah in the subject case is GRANTED.

DATED this 17 October 2011.

A handwritten signature in black ink, reading "Brooke C. Wells". The signature is written in a cursive, flowing style. The first letter of "Brooke" is a large, stylized capital "B". The signature is positioned above a horizontal line.

Brooke C. Wells
United States Magistrate Judge

UNITED STATES DISTRICT COURT

District of Utah

FILED
U.S. DISTRICT COURT

UNITED STATES OF AMERICA

v.

MELISSA ANN BENSON

Judgment in a Criminal Case

(For Revocation of Probation or Supervision or Release)

2011 OCT 17 A 7:42

CLERK OF DISTRICT COURT OF UTAH

BY:

Case No. DUTX209CR000673-001

USM No. 15801-081

Parker Douglas

Defendant's Attorney

THE DEFENDANT:

- ☒ admitted guilt to violation of condition(s) 5 of the Petition of the term of supervision.
☐ was found in violation of condition(s) _____ after denial of guilt.

The defendant is adjudicated guilty of these violations:

<u>Violation Number</u>	<u>Nature of Violation</u>	<u>Violation Ended</u>
5	Defendant committed another crime, to wit: she attempted to negotiate a counterfeit \$20 bill in Salt Lake City, UT	05/20/2011

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☒ The defendant has not violated condition(s) 1-4 of Petition and is discharged as to such violation(s) condition.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Last Four Digits of Defendant's Soc. Sec. No.: 4500

Defendant's Year of Birth: 1967

City and State of Defendant's Residence: _____

10/14/2011

Date of Imposition of Judgment

Signature of Judge

The Honorable Ted Stewart

Chief Judge

Name and Title of Judge

10/14/2011

Date

DEFENDANT: MELISSA ANN BENSON
CASE NUMBER: DUTX209CR000673-001-TS

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of :

27 Months

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends incarceration in a facility close to Utah

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____ with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: MELISSA ANN BENSON

CASE NUMBER: DUTX209CR000673-001-TS

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

None

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☐ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is be a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: MELISSA ANN BENSON
CASE NUMBER: DUTX209CR000673-001-TS

ADDITIONAL TERMS FOR CRIMINAL MONETARY PENALTIES

Restitution in the amount of \$1060 ordered on 3/16/09 for the original offense is referred to the Financial Litigation Unit at the United States Attorneys Office for collection.

UNITED STATES DISTRICT COURT

Central

U.S. DISTRICT COURT

District of

Utah

UNITED STATES OF AMERICA v. JUDGMENT IN A CRIMINAL CASE

V.

DISTRICT OF UTAH

Latutaofieikii Fakaosiuli

BY:

DEPUTY CLERK

Case Number:

DUTX 2:08CR00758-003 TC

USM Number:

15879-081

Ronald Fujino

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 28 of the Second Superseding Indictment

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 USC § 1951(a)	Hobbs Act Robbery		28ss

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☒ Count(s) 29ss of the Second Superseding Indictment ☐ is ☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

10/17/2011

Date of Imposition of Judgment

Tena Campbell

Signature of Judge

Tena Campbell

Name and Title of Judge

United States District Court Judge

Tena Campbell

Date

10-18-2011

DEFENDANT: Latutaofieikii Fakaosiuli
CASE NUMBER: DUTX 2:08CR00758-003 TC

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

TIME SERVED

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Latutaofieikii Fakaosiuli
CASE NUMBER: DUTX 2:08CR00758-003 TC

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

36 Months

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Latutaofieikii Fakaosiuli
CASE NUMBER: DUTX 2:08CR00758-003 TC

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant will submit to drug/alcohol testing under a copayment plan as directed by the USPO.
2. The defendant shall participate in a substance-abuse evaluation and/or treatment under a co-payment plan as directed by the probation office. During the course of treatment, the defendant shall not consume alcohol nor frequent any establishment where alcohol is the primary item of order.
3. The defendant shall not have any contact with any member or associate of a criminal street gang/prison gang either in person, by mail, by phone, by e-mail, by third person, or by any other method.
4. The defendant shall not possess material which gives evidence of criminal street gang/prison gang involvement or activity.
5. The defendant shall not receive any new tattoos associated with a criminal street gang prison gang.
6. The defendant shall not wear clothing or other items that may be identified with a criminal street gang/prison gang.
7. The defendant shall submit his person, residence, office, or vehicle to a search, conducted by the probation office at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
8. The defendant shall maintain full-time, verifiable employment or participate in academic or vocational development throughout the term of supervision as deemed appropriate by the USPO.

DEFENDANT: Latutaofieikii Fakaosiuli
CASE NUMBER: DUTX 2:08CR00758-003 TC

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$	\$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
----------------------	--------------------	----------------------------	-------------------------------

TOTALS	\$ _____ 0	\$ _____ 0
---------------	------------	------------

☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Latutaofieikii Fakaosiuli
CASE NUMBER: DUTX 2:08CR00758-003 TC

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

- ☐ Joint and Several
- Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.
- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH CENTRAL DIVISION

United States of America,

Plaintiff,

vs.

JEFFREY LANE MOWEN,

Defendant.

SCHEDULING ORDER

Case No. **2:09CR00098 DB**

District Judge **Dee Benson**

Magistrate Judge **Paul M. Warner**

The following matters are scheduled. The times and deadlines set forth herein may not be modified without the approval of the Court and on a showing of good cause.

The following times and deadlines are between the United States and Strategic Capital, LOA Capital, Intellectual Capital Investments and HS Capital (collectively the “Third-Party Claimants”).

****ALL TIMES 4:30 PM UNLESS INDICATED****

- | | | |
|-----------|---|----------------------|
| 1. | PRELIMINARY MATTERS | <u>DATE</u> |
| | Nature of claim(s) and any affirmative defenses: | |
| | a. Was Rule 26(f)(1) Conference held? | <u>n/a</u> |
| | b. Has Attorney Planning Meeting Form been submitted? | <u>n/a</u> |
| | c. Was 26(a)(1) initial disclosure completed? | <u>n/a</u> |
|
 | | |
| 2. | DISCOVERY LIMITATIONS | <u>NUMBER</u> |
| | a. Maximum Number of Depositions by Plaintiff(s) | <u>10</u> |
| | b. Maximum Number of Depositions by Claimant(s) | <u>10</u> |
| | c. Maximum Number of Hours for Each Deposition
(unless extended by agreement of parties) | <u>5</u> |
| | d. Maximum Interrogatories by any Party to any Party | <u>50</u> |
| | e. Maximum requests for admissions by any Party to any Party | <u>50</u> |
| | f. Maximum requests for production by any Party to any Party | <u>Unlimited</u> |

	<u>DATE</u>
3. AMENDMENT OF PLEADINGS/ADDING PARTIES	
a. Last Day to File Motion to Amend Pleadings	<u>Passed</u>
b. Last Day to File Motion to Add Parties	<u>Passed</u>
4. RULE 26(a)(2) REPORTS FROM EXPERTS¹	
a. Plaintiff	<u>02/21/2012</u>
b. Claimant	<u>03/20/2012</u>
c. Counter reports	<u>04/20/2012</u>
5. OTHER DEADLINES	
a. Discovery to be completed by:	
Fact discovery	<u>02/21/2012</u>
Expert discovery	<u>05/21/2012</u>
b. (optional) Final date for supplementation of disclosures and discovery under Rule 26 (e)	<u>None</u>
c. Deadline for filing dispositive or potentially dispositive motions	<u>06/20/2012</u>
6. SETTLEMENT/ ALTERNATIVE DISPUTE RESOLUTION	
a. Referral to Court-Annexed Mediation	
b. Referral to Court-Annexed Arbitration	
c. Evaluate case for Settlement/ADR on	<u>Unknown</u>
d. Settlement probability:	

7. **ANCILLARY HEARING**

a. Ancillary Hearing	<u>Length</u>	<u>Time</u>	<u>Date</u>
	<u>Two days</u>	<u>8:30 am</u>	<u>11/19/2012</u>

Dated this 18th day of October, 2011.

BY THE COURT:



Paul M. Warner, Magistrate Judge
United States District Court

1. A party shall disclose the identity of each testifying expert and the subject of each such expert's testimony at least 60 days before the deadline for expert reports from that party. This disclosure shall be made even if the testifying expert is an employee from whom a report is not required.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH CENTRAL DIVISION

United States of America,

Plaintiff,

vs.

JEFFREY LANE MOWEN,

Defendant.

SCHEDULING ORDER

Case No. **2:09CR00098 DB**

District Judge **Dee Benson**

Magistrate Judge **Paul M. Warner**

The following matters are scheduled. The times and deadlines set forth herein may not be modified without the approval of the Court and on a showing of good cause.

The following shall be the scheduling order for the prevailing party related to the Petition to Amend Oder of Forfeiture filed by Strategic Capital, LOA Capital, Intellectual Capital Investments and HS Capital; and the petitions of Andrew Sugar, Lawrence D. Sugar, Keith R. and Barbara Damon and Lakeside Storage.

****ALL TIMES 4:30 PM UNLESS INDICATED****

1.	PRELIMINARY MATTERS	<u>DATE</u>
	Nature of claim(s) and any affirmative defenses:	
a.	Was Rule 26(f)(1) Conference held?	<u>n/a</u>
b.	Has Attorney Planning Meeting Form been submitted?	<u>n/a</u>
c.	Was 26(a)(1) initial disclosure completed?	<u>n/a</u>
2.	DISCOVERY LIMITATIONS	<u>NUMBER</u>
a.	Maximum Number of Depositions by Plaintiff(s)	<u>10</u>
b.	Maximum Number of Depositions by Claimant(s)	<u>10</u>
c.	Maximum Number of Hours for Each Deposition (unless extended by agreement of parties)	<u>5</u>
d.	Maximum Interrogatories by any Party to any Party	<u>50</u>
e.	Maximum requests for admissions by any Party to any Party	<u>50</u>
f.	Maximum requests for production by any Party to any Party	<u>Unlimited</u>

DATE

3. AMENDMENT OF PLEADINGS/ADDING PARTIES

- a. Last Day to File Motion to Amend Pleadings *Passed*
- b. Last Day to File Motion to Add Parties *Passed*

4. RULE 26(a)(2) REPORTS FROM EXPERTS¹

- a. Plaintiff *11/09/2012*
- b. Claimant *12/10/2012*
- c. Counter reports *01/10/2013*

5. OTHER DEADLINES

- a. Discovery to be completed by:
 - Fact discovery *10/10/2012*
 - Expert discovery *02/11/2013*
- b. *(optional)* Final date for supplementation of disclosures and discovery under Rule 26 (e) *None*
- c. Deadline for filing dispositive or potentially dispositive motions *03/11/2013*

6. SETTLEMENT/ ALTERNATIVE DISPUTE RESOLUTION

- a. Referral to Court-Annexed Mediation
- b. Referral to Court-Annexed Arbitration
- c. Evaluate case for Settlement/ADR on *Unknown*
- d. Settlement probability:

7. **ANCILLARY HEARING**

a. Ancillary Hearing	<u>Length</u>	<u>Time</u>	<u>Date</u>
	<u>Two days</u>	<u>8:30 am</u>	<u>08/12/2013</u>

Dated this 18th day of October, 2011.

BY THE COURT:



Paul M. Warner, Magistrate Judge
United States District Court

1. A party shall disclose the identity of each testifying expert and the subject of each such expert's testimony at least 60 days before the deadline for expert reports from that party. This disclosure shall be made even if the testifying expert is an employee from whom a report is not required.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

USA Plaintiff(s), vs. Michael Wight Defendant(s).	 NOTICE Case No. 2:09CR930
---	---

Michael was seen at home last week. He wasn't in a talkative mood, so the interview was short. He has cleaned up his apartment a bit, as he has put some items in the storage boxes he was provided with. Unfortunately, he didn't know how to put the boxes together, so he was given a hands-on lesson. He said he would like more boxes. He appeared to be doing well. He keeps his medications right next to his bed.

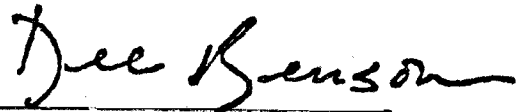
(USPO John Warner):
DATE: October 17, 2011

Stephen C. McKenna, Esq. (*pro hac vice*)
Polly A. Atkinson, Esq.
mckennas@sec.gov
atkinsonp@sec.gov
Securities and Exchange Commission
1801 California Street, Suite 1500
Denver, CO 80202
(303) 844-1000

Thomas M. Melton, Esq.
meltont@sec.gov
Securities and Exchange Commission
15 W. South Temple Street
Suite 1800
Salt Lake City, UT 84101
(801) 524-6748

Attorneys for Plaintiff,
Securities and Exchange Commission

SO ORDERED


DEE BENSON
United States District Judge

Date 10/17/11

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION**

SECURITIES AND EXCHANGE
COMMISSION,

Plaintiff

v.

Jeffrey L. Mowen, Thomas R. Fry,
Bevan J. Wilde, Gary W. Hansen, Michael
G. Butcher, James B. Mooring, David G.
Bartholomew, and Michael W. Averett,

Defendants,

Erin O'Malley f/k/a Erin O. Mowen,

Relief Defendant.

**PLAINTIFF'S MOTION TO
FILE BRIEF SURREPLY TO
DEFENDANT ERIN
O'MALLEY'S RULE 60(b)
MOTION FOR RELIEF FROM
FINAL JUDGMENT, ORDER,
OR PROCEEDING AND
MEMORANDUM IN SUPPORT**

Case No. 2:09-cv-00786-DB

District Court Judge Dee Benson

Magistrate Judge Paul M. Warner

In her Reply Memorandum Re: Defendant Erin O'Malley's Rule 60(b) Motion for Relief from Final Judgment, Order, or Proceeding ("Reply"), Ms. O'Malley, for the first time, states that the SEC's "criminal investigation team" encouraged her not to oppose its civil action and threatened to "prosecute her criminally" if she tried to withdraw or use any of the funds in an Axa account. Reply at 2. These new and unfounded accusations warrant a brief surreply so that the SEC can state for the record that no such threats or coercions were made to Ms. O'Malley or her counsel. The SEC respectfully requests, pursuant to DUCivR 7-1(b)(3)(B), that the Court accept Plaintiff's surreply, which is attached hereto.

Dated this 14th day of October, 2011.

Respectfully submitted,

s/ Stephen C. McKenna
Stephen C. McKenna, Colo. Bar No. 28744
(*pro hac vice*)
Polly A. Atkinson, Colo. Bar No. 18703
Attorneys for Plaintiff
Securities and Exchange Commission
1801 California Street, Suite 1500
Denver, CO 80202
Telephone (303) 844-1000
Fax (303) 844-1068
Email: McKennaS@sec.gov
Email: AtkinsonP@sec.gov

CERTIFICATE OF SERVICE

I certify that on this 14th day of October, 2011, I caused a copy of the **PLAINTIFF'S MOTION TO FILE BRIEF SURREPLY TO RELIEF DEFENDANT ERIN O'MALLEY f/k/a ERIN O. MOWEN'S RULE 60(b) MOTION FOR RELIEF FROM FINAL JUDGMENT, ORDER, OR PROCEEDING** to be served upon the following parties by Notice of Electronic Filing by email to the following attorneys for the parties who are registered users of ECF. For unrepresented parties, a copy was served via U.S. Mail.

Douglas E. Griffith: dgriffith@keslerrust.com
Attorney for Defendants Mooring and Averett

Brad Lam: brad@lamlaw.net
Attorney for Defendants Hansen and Butcher

Jennifer A. James: jaj@clydesnow.com
Attorney for Defendant Fry

Robert S. Clark: rclark@parrbrown.com
James Logan Ahlstrom: jahlstrom@parrbrown.com
Attorneys for Defendant Bartholomew

Jeffrey L. Mowen
Inmate No. 200904512
c/o Davis County Jail
800 West State Street
Farmington, UT 84025

Erin O'Malley
915 East 440 North
Lindon, UT 84042

Bevan Wilde
4872 Sampson Court
Highland, UT 84003

s/ Nicole L. Nesvig

UNITED STATES DISTRICT COURT

FILED
U.S. DISTRICT COURT

District of Utah

UNITED STATES OF AMERICA

v.

WALTER EDMUND BOND

JUDGMENT IN A CRIMINAL CASE

DISTRICT OF UTAH

Case Number: DUTX2100CR000844-001-TS

USM Number: 37096-081

Nathan Crane

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 and 3 of the Indictment

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 844(i)	Arson Damaging Property in Interstate Commerce		1,3

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☒ Count(s) 2 and 4 of the Indictment ☐ is ☒ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

10/13/2011

Date of Imposition of Judgment

Signature of Judge

The Honorable Ted Stewart

Name of Judge

Chief Judge

Title of Judge

10/14/2011

Date

DEFENDANT: WALTER EDMUND BOND
CASE NUMBER: DUTX210CR000844-001-TS

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

87 months to run consecutive to sentence imposed in CO

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends incarceration in New York for family visitation

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: WALTER EDMUND BOND
CASE NUMBER: DUTX210CR000844-001-TS

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :
36 Months

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
- ☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*
- ☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: WALTER EDMUND BOND
CASE NUMBER: DUTX210CR000844-001-TS

SPECIAL CONDITIONS OF SUPERVISION

- 1) Defendant shall not association with the ALF (Animal Liberation Front) or any member either in person, by mail, by phone, by e-mail, by third person, or by any other method.
- 2) The defendant shall submit his person, residence, office, or vehicle to a search, conducted by the probation office at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

DEFENDANT: WALTER EDMUND BOND
CASE NUMBER: DUTX210CR000844-001-TS

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payment of \$ 200.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☒ Special instructions regarding the payment of criminal monetary penalties:
Restitution to date in the amount of \$10,000 is imposed and payable at a rate of \$10/month while incarcerated, and at a minimum rate of \$100/month upon release. Additional restitution costs may be submitted by 12/12/2011.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

FILED
U.S. DISTRICT COURT
2011 OCT 18 A 11:07
DISTRICT OF UTAH
BY: _____
DEPUTY CLERK

MARK E. KITTRELL, A9950
FABIAN & CLENDENIN, P.C.
Attorneys for Defendant
215 S. State Street, Suite 1200
Salt Lake City, Utah 84111-2323
Telephone: (801) 531-8900
Facsimile: (801) 531-1716
Email: mkittrell@fabianlaw.com

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

JESUS BELLO-RAMIREZ,

Defendant.

**ORDER TO FILE DEFENDANT'S
SENTENCING MEMORANDUM
UNDER SEAL**

Case No. 2:10CR00993-DS

Pursuant to DUCrim. R. 49-2(b) and for good cause shown,

IT IS HEREBY ORDERED that the Sentencing Memorandum of Defendant, JESUS BELLO-RAMIREZ, may be filed under seal.

ORDERED this 18th day of OCTOBER, 2011.

A handwritten signature in cursive script, appearing to read "David Sam", is written above a horizontal line.

HON. DAVID SAM
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF DELIVERY

I hereby certify that a true and correct copy of the foregoing **ORDER TO FILE SENTENCING MEMORANDUM UNDER SEAL** was provided electronically via the ECF system to all parties named below on this 13th day of October, 2011:

Drew Yeates
Assistant United States Attorney
185 South State St., Suite 300
Salt Lake City, Utah 84111
drew.yeates@usdoj.gov

UNITED STATES DISTRICT COURT

U.S. DISTRICT COURT
District of Utah

UNITED STATES OF AMERICA

v.

JOSEPH ANTHONY TODD

2011 OCT 14 P 2:44

JUDGMENT IN A CRIMINAL CASE

DISTRICT OF UTAH

BY:

DEPUTY CLERK

Case Number: DUTX210CR001092-001-TS

USM Number: 17729-081

Jeremy Delicino

Defendant's Attorney

THE DEFENDANT:

☒ pleaded guilty to count(s) 1 of the Indictment

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☐ was found guilty on count(s) _____
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 2251(a)	Production of Child Pornography		1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☒ Count(s) 2 of the Indictment ☒ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

10/13/2011

Date of Imposition of Judgment

Signature of Judge

The Honorable Ted Stewart

Name of Judge

Chief Judge

Title of Judge

10/14/2011

Date

DEFENDANT: JOSEPH ANTHONY TODD
CASE NUMBER: DUTX210CR001092-001-TS

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

300 Months to run concurrent to his State of Utah sentence.

☒ The court makes the following recommendations to the Bureau of Prisons:

The Court recommends incarceration in the East (probably Butner, NC), to facilitate family visitation.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: JOSEPH ANTHONY TODD
CASE NUMBER: DUTX210CR001092-001-TS

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :
Life

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*
- ☒ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*
- ☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: JOSEPH ANTHONY TODD
CASE NUMBER: DUTX210CR001092-001-TS

SPECIAL CONDITIONS OF SUPERVISION

- 1) The Court orders that the presentence report may be released to the state sex-offender registration agency if required for purposes of sex-offender registration.
- 2) The defendant shall participate in a sex-offender treatment program as directed by the probation office.
- 3) The defendant is restricted from contact with individuals who are under 18 years of age without adult supervision as approved by the probation office.
- 4) The defendant shall abide by the following occupational restrictions: Any employment shall be approved by the probation office. In addition, if third-party risks are identified, the probation office is authorized to inform the defendants employer of his supervision status.
- 5) The defendant shall not view, access, or possess sexually explicit materials in any format.
- 6) The defendant shall submit his person, residence, office, or vehicle to a search, conducted by the probation office at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; the defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
- 7) The defendant shall participate in the United States Probation and Pretrial Services Office Computer and Internet Monitoring Program under a copayment plan, and will comply with the provisions outlined in: Appendix B, Restricted Internet Access (Computer access only, as approved)
- 8) Defendant shall have no contact of any type with the victim (MR), or the victim's brother (TR).

DEFENDANT: JOSEPH ANTHONY TODD
CASE NUMBER: DUTX210CR001092-001-TS

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 100.00	\$ 0.00	\$ 0.00

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>

TOTALS	\$ _____	0.00	\$ _____	0.00
---------------	----------	------	----------	------

☐ Restitution amount ordered pursuant to plea agreement \$ _____

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: JOSEPH ANTHONY TODD
CASE NUMBER: DUTX210CR001092-001-TS

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

- A ☒ Lump sum payment of \$ 100.00 due immediately, balance due
- ☐ not later than _____, or
☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or
- B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or
- C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or
- D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or
- E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or
- F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

- ☐ The defendant shall pay the cost of prosecution.
- ☐ The defendant shall pay the following court cost(s):
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.